

1 JORDAN ETH (CA SBN 121617)
JEth@mofo.com
2 JUDSON E. LOBDELL (CA SBN 146041)
JLobdell@mofo.com
3 CRAIG D. MARTIN (CA SBN 168195)
CMartin@mofo.com
4 MORRISON & FOERSTER LLP
425 Market Street
5 San Francisco, California 94105-2482
Telephone: (415) 268-7000
6 Facsimile: (415) 268-7522

7 Attorneys for Defendants
8 SUNPOWER CORPORATION, THOMAS H. WERNER,
DENNIS V. ARRIOLA, and EMMANUEL T. HERNANDEZ

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 IN RE SUNPOWER SECURITIES
LITIGATION

Case No. CV 09-5473-RS (JSC)
(Consolidated)

15 **CLASS ACTION**

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20 DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR PARTIAL
JUDGMENT ON THE PLEADINGS
REGARDING FORWARD-LOOKING
STATEMENTS AND VAGUE
STATEMENTS OF CORPORATE
OPTIMISM

21 Judge: Hon. Richard Seeborg
Courtroom: 3, 17th Floor
Hearing Date: October 25, 2012
Hearing Time: 1:30 p.m.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on Thursday, October 25, 2012, at 1:30 p.m., or at such
4 time thereafter as the matter may be heard, in the courtroom of the Honorable Richard Seeborg,
5 located at 450 Golden Gate Avenue, San Francisco, California, Courtroom 3, 17th Floor,
6 Defendants SunPower Corporation, Thomas H. Werner, Dennis V. Arriola, and Emmanuel T.
7 Hernandez (the “Defendants”) will, and hereby do, move the Court pursuant to Federal Rule of
8 Civil Procedure 12(c) for an order granting judgment on those claims asserted in the First
9 Amended Consolidated Class Action Complaint filed on April 18, 2011 that are based on
10 forward-looking statements and vague statements of corporate optimism.

11 This Motion is based on this Notice; the Memorandum of Points and Authorities and
12 accompanying Attachments; the supporting Request for Judicial Notice, the Declaration of
13 Andrew S. Bernick and the exhibits attached thereto; all pleadings and papers in this action; such
14 oral argument as may be presented to the Court; and any other matters of which the Court may
15 take judicial notice.

ISSUES TO BE DECIDED

17 1. Whether the Court should grant judgment in favor of Defendants on Plaintiffs'
18 Section 10(b) and Section 20(a) claims based on forward-looking statements on the ground that
19 these claims are precluded by the Private Securities Litigation Reform Act's "safe harbor," 15
20 U.S.C. § 78u-5(c).

21 2. Whether the Court should grant judgment in favor of Defendants on Plaintiffs'
22 Section 10(b) and Section 20(a) claims based on forward-looking statements on the additional,
23 independent ground that Plaintiffs have not alleged facts showing that those statements lacked a
24 reasonable basis when made.

25 3. Whether the Court should also grant judgment in favor of Defendants on
26 Plaintiffs' Section 10(b) and Section 20(a) claims based on vague statements of corporate
27 optimism on the ground that such statements are not actionable as a matter of law.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

3 In its December 19, 2011 Order, the Court deferred ruling on whether or not forward-
4 looking statements and vague statements of corporate optimism alleged to be false in the First
5 Amended Consolidated Class Action Complaint (the “FAC”) are actionable. *In re SunPower Sec.*
6 *Litig. (SunPower II)*, No. C 09-5473 RS, 2011 U.S. Dist. LEXIS 152920, at *17 n.6 (N.D. Cal.
7 Dec. 19, 2011). Defendants respectfully request that the Court address this issue now, and grant
8 Defendants judgment on the pleadings with respect to all claims arising out of these statements.

The forward-looking statements, which concern an assortment of different subjects, are not actionable as a matter of law for two reasons. First, each of these statements was accompanied by meaningful cautionary language and is, therefore, protected by the “safe harbor” of the Private Securities Litigation Reform Act of 1995. Second, the FAC does not show that any of the forward-looking statements lacked a reasonable basis when made.

14 The vague statements of corporate optimism, such as that the “overall global business
15 environment remains very favorable” and that SunPower is “well-positioned for success” also
16 cannot support a claim based on controlling Ninth Circuit law.

17 Entry of judgment in favor of Defendants on these claims now will avoid wasting judicial
18 resources and burdening the parties with unnecessary discovery. It will allow the parties to focus
19 their efforts on the accounting-related allegations that form the basis of the claims the Court
20 allowed to proceed.

BACKGROUND

22 In November 2009, SunPower Corporation (“SunPower” or the “Company”) announced
23 that its Audit Committee had begun an investigation into unsubstantiated entries in the accounting
24 records of its Philippines manufacturing operations. *SunPower II*, 2011 U.S. Dist. LEXIS
25 152920, at *6; (FAC ¶ 116).¹ In March 2010, SunPower announced that its Audit Committee had

¹ All references to “FAC ¶ __” are to the paragraphs in the FAC. All references to “Ex. __” are to the numbered exhibits attached to the Declaration of Andrew S. Bernick. All references to “Dkt. No. __” are to the docket numbers assigned by PACER to the documents filed in this action.

1 completed its investigation, and the Company filed restated financial statements for 2008 and the
 2 first three quarters of 2009. *SunPower II*, 2011 U.S. Dist. LEXIS 152920, at *6; (FAC ¶¶ 122,
 3 124). The Audit Committee concluded that the accounting errors were confined to the books of
 4 the Philippines manufacturing operation, and that SunPower's San Jose-based executive
 5 management had no involvement in, or knowledge of, these errors. *SunPower II*, 2011 U.S. Dist.
 6 LEXIS 152920, at *6-7; (FAC ¶ 124).

7 Several complaints were filed shortly after SunPower's initial November 2009
 8 announcement. A Consolidated Complaint was filed on May 28, 2010. On March 1, 2011, the
 9 Court dismissed the Consolidated Complaint with leave to amend. *Plichta v. SunPower Corp.*
 10 (*SunPower I*), 790 F. Supp. 2d 1012, 1024 (N.D. Cal. 2011).

11 Plaintiffs filed the FAC on April 18, 2011, alleging claims under Section 10(b) of the
 12 Securities Exchange Act of 1934 and Rule 10b-5 against SunPower, as well as its CEO Thomas
 13 H. Werner, and its former CFOs Emmanuel T. Hernandez and Dennis V. Arriola (the "Individual
 14 Defendants").²

15 As the Court previously noted, the statements alleged to be false in the FAC fall into two
 16 distinct categories. *SunPower II*, 2011 U.S. Dist. LEXIS 152920, at *17 n.6. First, Plaintiffs
 17 challenge SunPower's reporting of its financial results and its description of its internal controls
 18 over financial reporting during the seven quarters at issue in this case—from the first quarter of
 19 2008 through the third quarter of 2009. *Id.*

20 Second, Plaintiffs challenge statements made during the Class Period that are either
 21 (1) forward-looking, (2) vague statements of corporate optimism, or (3) both. The statements,
 22 and the reasons they are not actionable, are set out in the chart attached to this Motion as
 23
 24

25
 26 ² Plaintiffs also allege Section 20(a) "control-person" claims against the Individual Defendants.
 27 If the Court dismisses the Section 10(b) claims challenged in this motion, it should also dismiss
 28 the related Section 20(a) claims. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990
 ("Section 20(a) claims may be dismissed summarily . . . if a plaintiff fails to
 adequately plead a primary violation of section 10(b).").

1 Attachment A and numbered 1 through 32.³ These statements address a variety of topics, such as
 2 SunPower's predictions regarding the future costs of materials it uses to manufacture solar cells
 3 (e.g., FAC ¶ 138) and projections of future financial results. (E.g., *id.* ¶¶ 147, 157.)

4 Defendants moved to dismiss the FAC on several grounds. (Dkt. No. 155.) On
 5 December 19, 2011, the Court granted Defendants' motion to dismiss the FAC, in part,⁴ but
 6 allowed a Section 10(b) claim to proceed against SunPower and Section 10(b) and 20(a) claims to
 7 proceed against the Individual Defendants. *SunPower II*, 2011 U.S. Dist. LEXIS 152920, at *16-
 8 17.

9 In its ruling, the Court declined to address Defendants' arguments that the forward-
 10 looking statements and vague statements of corporate optimism were not actionable, stating,

11 Defendants also seek dismissal of the claims to the extent they are based on
 12 representations that they characterize as "forward looking" or "vague
 13 statements of corporate optimism." In light of the fact that the FAC
 14 unquestionably includes alleged misrepresentations of existing material fact,
 15 further parsing of exactly which statements or portions thereof might or
 16 might not be actionable is not appropriate at this juncture.

17 *Id.* at *17 n.6. The Court did not otherwise address Defendants' arguments concerning the
 18 forward-looking statements and vague statements of corporate optimism.

19 Under the Court's Scheduling Order, the anticipated date to substantially complete fact
 20 discovery is May 31, 2013. (Dkt. No. 190.) To date, a deadline to file summary judgment
 21 motions has not been set, and the parties have not taken any depositions. Defendants have begun
 22 producing documents responsive to Plaintiffs' document requests, but at least 11 of Plaintiffs'
 23 document requests (Nos. 14, 18, 19, 21, 24, 25, 27, 41, 43, 44, and 45) ask for information
 24 relating to the forward-looking statements at issue in this case. (Ex. 23 at 18-20, 22, 23.) Request

25 ³ Twenty-six of the statements in Attachment A are only forward-looking (Nos. 2-10, 12-16, 19-
 26 25, 27, 28, 30-32). Five are both forward-looking and vague statements of corporate optimism
 27 (Nos. 1, 11, 17, 18, and 29). And one statement, No. 26, is only a vague statement of corporate
 28 optimism.

⁴ Specifically, the Court dismissed Plaintiffs' Securities Act claims in their entirety, as well as
 Section 10(b) claims alleged against two former SunPower employees, John B. Rodman and
 Mariano M. Trinidad. *SunPower II*, 2011 U.S. Dist. LEXIS 152920, at *18 and n.7.

1 No. 18, for instance, asks for “All documents concerning forecasts” for a list of financial metrics.
 2 (*Id.* at 18.) Request No. 25 asks for “All documents concerning, or providing the bases for, any
 3 financial guidance or projections provided by SunPower, Hernandez, Arriola, or Werner to the
 4 market, analysts or investors” (*Id.* at 19-20.)

5 **ARGUMENT**

6 **I. JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED WHEN THE**
7 FACTS ALLEGED FAIL TO SUPPORT A CLAIM, AND ENTRY OF
JUDGMENT WOULD AVOID WASTEFUL LITIGATION.

8 Federal Rule of Civil Procedure 12(c) provides: “After the pleadings are closed—but
 9 early enough not to delay trial—a party may move for judgment on the pleadings.” A Rule 12(c)
 10 motion challenges the legal sufficiency of the opposing party’s pleadings. It provides a vehicle
 11 for summary adjudication on the merits, “which may save the parties needless and often
 12 considerable time and expense which otherwise would be incurred during discovery and trial.”
 13 *Gonzalez v. Merck & Co., Inc.*, No. CV-07-3034-LRS, 2007 WL 2220286, at *2 (E.D. Wash.
 14 Aug. 2, 2007) (citing *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993)). “[I]t is
 15 common practice to apply Rule 12(c) to individual causes of action.” *Nahas v. City of Mountain*
 16 *View*, No. C 03-05057 JW, 2005 WL 1683617, at *3 (N.D. Cal. July 19, 2005) (citation omitted).

17 A motion for judgment on the pleadings is “functionally identical” to a Rule 12(b)(6)
 18 motion. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir.
 19 2011). Thus, “judgment on the pleadings is properly granted when, taking all the allegations in
 20 the pleading as true, the moving party is entitled to judgment as a matter of law.” *Heliotrope*
 21 *Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 978-79 (9th Cir. 1999). “When considering a motion
 22 for judgment on the pleadings, [a] court may consider facts that ‘are contained in materials of
 23 which the court may take judicial notice.’” *Id.* at 981 n.18 (quoting *Barron v. Reich*, 13 F.3d
 24 1370, 1377 (9th Cir. 1994)).

25 The heightened pleading standards of Rule 9(b) and the Reform Act apply to motions for
 26 judgment on the pleadings. *In re Clorox Co. Sec. Litig.*, 238 F. Supp. 2d 1139, 1146-47 (N.D.
 27 Cal. 2002), *aff’d*, 353 F.3d 1125 (9th Cir. 2004). Thus, Plaintiffs must meet “exacting
 28 requirements for pleading ‘falsity.’” *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d

1 1049, 1070 (9th Cir. 2008). In particular, Plaintiffs must “specify each statement alleged to have
 2 been misleading” and “the reason or reasons why the statement is misleading.” 15 U.S.C. § 78u-
 3 4(b)(1).

4 Judgment with respect to the forward-looking statements is appropriate at this time in
 5 order to prevent the parties and the Court from incurring further costs with respect to claims that
 6 are not viable. As the Supreme Court observed in *Blue Chip Stamps v. Manor Drug Stores*:
 7 “There has been widespread recognition that litigation under Rule 10b-5 presents a danger of
 8 vexatiousness different in degree and in kind from that which accompanies litigation in general,”
 9 including the burden imposed on officers and directors in taking time away from the business to
 10 engage in discovery. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). The
 11 purpose of the Reform Act’s safe harbor is to free executives to make forward-looking statements
 12 by removing the threat of burdensome and distracting litigation. *See In re Splash Tech. Holdings,*
 13 *Inc. Sec. Litig.*, No. C 99-00109-SBA, 2000 WL 1727377, at *5 (N.D. Cal. Sept. 29, 2000) (“The
 14 purpose behind [the] safe harbor is to encourage the disclosure of forward-looking information.”).
 15 That purpose is only served where the safe harbor protections are enforced early in the
 16 litigation—before the burden and distraction of discovery takes its toll. Consistent with this
 17 reasoning, courts frequently grant motions to dismiss securities fraud claims based on the
 18 protections of the safe harbor. *See, e.g., In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111-13 (9th Cir.
 19 2010); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, --- F. Supp. 2d ---, No. 5:11-CV-
 20 04003-LHK, 2012 WL 3010992, at *14 (N.D. Cal. July 23, 2012).

21 **II. DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFFS’ CLAIMS
 22 BASED ON FORWARD-LOOKING STATEMENTS.**

23 **A. The Forward-Looking Statements are Protected by the Reform Act’s Safe
 24 Harbor.**

25 The Reform Act’s safe harbor shields from liability any misstatement that is forward-
 26 looking so long as the statement is “identified as such” and “accompanied by meaningful
 27 cautionary statements.” *Emp’rs Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox*
 28 *Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004) (citing 15 U.S.C. § 78u-5(c)). If a forward-looking
 statement satisfies these requirements, “then the state of mind of the individual making the

1 statement is irrelevant, and the statement is not actionable regardless of the plaintiff's showing of
 2 scienter." *Cutera*, 610 F.3d at 1112.

3 Forward-looking statements include financial projections, management's plans or
 4 objectives for future operations, predictions of future economic performance, and any statement
 5 of the assumptions underlying the foregoing. 15 U.S.C. § 78u-5(i)(1); *Cutera*, 610 F.3d at 1108.
 6 A present-tense statement qualifies as forward-looking "as long as the truth or falsity of the
 7 statement cannot be discerned until some point in time after the statement is made." *In re Splash*
 8 *Tech. Holdings Inc. Sec. Litig.*, 160 F. Supp. 2d 1059, 1067 (N.D. Cal. 2001).

9 For cautionary language to be "meaningful," the safe harbor requires the warning only to
 10 mention "important factors that could cause actual results to differ materially from those in the
 11 forward-looking statement." 15 U.S.C. § 78u-5(c)(1)(A)(i); *Clorox*, 353 F.3d at 1133. "It does
 12 not require a listing of *all* factors." *Harris v. Ivax*, 182 F.3d 799, 807 (11th Cir. 1999) (original
 13 emphasis). Nor does it require specification of "'the particular factor that ultimately causes the
 14 forward-looking statement not to come true.'" *Id.*; see also *Splash Tech.*, 2000 WL 1727377, at
 15 *7. So long as "an investor has been warned of risks of a significance similar to that actually
 16 realized, she is sufficiently on notice of the danger of the investment to make an intelligent
 17 decision about it according to her own preferences for risk and reward." *Harris v. Ivax*, 182 F.3d
 18 at 807.

19 Most of the forward-looking statements Plaintiffs challenge concern either predicted
 20 future financial performance or expectations for future cost reductions. As demonstrated in
 21 Attachment B,⁵ and as stated below, these statements satisfy the safe harbor's requirements and,
 22 therefore, cannot form the basis of liability.⁶

23
 24 ⁵ Attachment B lists: (1) all 31 forward-looking statements, (2) public statements made by
 25 Defendants that identify each statement as forward-looking, and (3) the accompanying
 26 meaningful cautionary language for each statement (identified as "Accompanying Risk
 Disclosures"). The statements in Attachment B are numbered identically to the statements in
 Attachment A.

27 ⁶ The same statements are also protected by the analogous "bespeaks caution" doctrine, which
 28 allows the Court to rule as a matter of law that forward-looking statements contain enough
 cautionary language or risk disclosure to protect against liability. See *Clorox*, 353 F.3d at 1132;
 [Footnote continues on following page.]

1 **1. SunPower's projections about its future financial results are protected
2 by the safe harbor.**

3 Statement Nos. 7, 10, 15, 20, 22, 30, and 31 contain projections of future financial results,
4 such as statements projecting future gross margin. These statements fall squarely within the safe
5 harbor's definition of forward-looking statements. *See* 15 U.S.C. § 78u-5(i)(1)(A). As shown in
6 Attachment B, each of these statements is identified as forward-looking and accompanied by
7 meaningful cautionary language. The safe harbor, therefore, precludes claims based on these
8 statements. *Cutera*, 610 F.3d at 1112.

9 Statement No. 7, from SunPower's April 17, 2008 earnings press release, is illustrative.
10 There, Mr. Werner stated: "*[W]e expect to reach our target financial model of 30% gross
11 margin, 10% operating expenses and 20% operating margin, on a non-GAAP basis, no later
12 than the first quarter of 2009.*" (FAC ¶ 138.)⁷ This statement is forward-looking since it
13 predicts future margins. *See, e.g., In re Thoratec Corp. Sec. Litig.*, No. C-04-03168 RMW, 2006
14 WL 1305226, at *7 (N.D. Cal. May 11, 2006) (dismissing complaint and ruling "predicted gross
15 margins" are forward-looking statements). The press release identified the statement as forward-
16 looking: "Forward-looking statements in this press release include . . . the company's plans and
17 expectations regarding . . . the company reaching its target financial model of 30% gross margin,
18 10% operating expenses and 20% operating margin, on a non-GAAP basis, no later than the first
19 quarter of 2009[.]" (Ex. 2 at 9.)

20 The press release also cautioned investors that several risks could cause SunPower's
21 financial projections to fall short, including "business and economic conditions and growth trends
22 in the solar power industry," and "the company's ability to compete with other companies and
23 competing technologies." (*Id.* at 9-10.) The press release also referred investors to SunPower's

24
25 [Footnote continued from previous page.]

26 *see also In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d. 857, 876 (N.D. Cal. 2004)
27 (dismissing forward-looking statements based on both the safe harbor and bespeaks caution
28 doctrine and stating "it is appropriate to consider the two protections simultaneously").

⁷ This statement and all subsequent statements quoted from the FAC in this brief contain original emphasis (unless otherwise indicated).

1 then most recent periodic SEC filing—its fiscal year 2008 Form 10-K—which in turn disclosed
 2 additional risks, including the possibility that SunPower could “miss . . . future guidance” because
 3 of the “average selling price of [its] solar cells” and “the availability and pricing of raw materials,
 4 particularly polysilicon.” (Ex. 1 at 21.) The Form 10-K disclosed further risks relating to
 5 SunPower’s rapid growth, including “difficulties in effectively managing the budgeting,
 6 forecasting, and other process control issues presented by rapid growth”; and “implement[ing]
 7 and improv[ing] . . . financial and operations systems, procedures and controls, including the need
 8 to update and integrate our financial internal control systems . . . in our Philippines facility with
 9 those of our San Jose, California headquarters . . .” (*Id.* at 19).⁸

10 The cautionary language here is more detailed and specific than the language held to be
 11 “meaningful” in other cases. For example, in *Juniper Networks*, the court dismissed claims based
 12 on statements discussing future revenue and business prospects when the company warned of
 13 “[f]luctuating economic conditions [that] make it difficult to predict revenues for a particular
 14 period” and “intense competition that could reduce . . . revenues and adversely affect . . . financial
 15 results[.]” *Juniper Networks*, 2012 WL 3010992, at *13-14. Here, SunPower’s warnings went
 16 much further, not only cautioning investors about unpredictable financial results and competition,
 17 but also identifying specific factors relating directly to its business, such as the price of
 18 polysilicon, competition with new solar manufacturers, and issues related to its rapid growth.
 19 Indeed, these risk factors were not just of “a significance similar to that actually realized,” *Harris*,
 20 182 F.3d at 807, they were precisely the risks that Plaintiffs claim actually occurred. (E.g., FAC
 21 ¶ 5 (“The market that SunPower had once led through technological innovation and engineering
 22 savvy had become an oversupplied commodities market dominated by a host of new solar power
 23 companies hoping to profit from the alternative energy boom.”).) For these reasons, as shown in
 24 Attachment B, Statements 7, 10, 15, 20, 22, 30, and 31 are not actionable as a matter of law under
 25

26 ⁸ Referring investors to risk disclosures in other SEC reports satisfies the safe harbor. See
 27 *Wozniak v. Align Tech., Inc.*, No. C-09-3671 MMC, 2011 WL 2269418, at *6-7 (N.D. Cal.
 28 June 8, 2011) (dismissing forward-looking statements and ruling risk disclosures from other SEC
 report were adequate when “incorporated by reference” into a separate statement).

1 the safe harbor. *See Juniper Networks*, 2012 WL 3010992, at *12; *see also Cutera*, 610 F.3d at
 2 1112 (affirming dismissal of forward-looking statements when company warned of its “ability to
 3 continue increasing sales performance worldwide”).

4 **2. SunPower’s statements about its cost-reduction plans are protected by
 5 the safe harbor.**

6 The safe harbor also protects SunPower’s statements concerning its plans and projections
 7 for cost reduction.⁹ These statements are defined by the safe harbor as forward-looking since
 8 they are statements about future economic performance. *See* 15 U.S.C. § 78u-5(i)(1)(C); *see also*
 9 *In re LeapFrog Enters., Inc. Sec. Litig.*, 527 F. Supp. 2d 1033, 1046 (N.D. Cal. 2007) (statement
 10 that company expects certain investments “will lead to . . . reduced costs in the long run”
 11 considered forward-looking). Each of these statements was also identified as forward-looking
 12 and accompanied by meaningful risk disclosures.

13 For example, in Statement No. 14, Mr. Werner stated that SunPower was confident in its
 14 cost-reduction plans because it expected polysilicon costs to “**continue to decline.**” (FAC ¶ 146.)
 15 However, SunPower informed investors that it had entered into “long-term” supply agreements
 16 for polysilicon at fixed prices, and warned that “[i]f the market price of polysilicon in future
 17 periods is less than the price we have committed to pay . . . , our cost of production could be
 18 comparatively higher than that of competitors who buy polysilicon on the open market.” (Ex. 4 at
 19 48.) SunPower also warned that because of its long-term supply agreements, a future decline in
 20 polysilicon price would “adversely affect our business and results of operations.” (*Id.*) This risk
 21 concerning polysilicon is the exact same risk Plaintiffs allege actually materialized. (*See, e.g.*,
 22 FAC ¶ 5 (“[D]uring the Class Period, SunPower was locked into high-cost supply contracts for
 23 polysilicon . . . from fixed, non-cancelable purchase commitments signed earlier, when market
 24 demand for polysilicon exceeded available supplies. SunPower competitors, meanwhile, enjoyed
 25 drastically lower market prices for polysilicon beginning in the second half of 2008.”).)

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 27

 28 ⁹ Statement Nos. 3, 4, 6, 8, 9, 11-14, 16, 19, 21, 23, and 29.

1 In addition, in Statement No. 3, SunPower predicted that “*higher efficiencies*” and the use
 2 of “*thinner wafers*” would contribute to additional cost reductions. (FAC ¶ 138.) But SunPower
 3 warned investors about its predictions regarding achieving higher manufacturing efficiencies and
 4 thinner wafers by disclosing, for example, that:

5 Although we have implemented production using thinner wafers and
 6 anticipate further reductions in wafer thickness, these methods may have
 7 unforeseen negative consequences on our yields or our solar cell efficiency
 8 or reliability once they are put into large-scale commercial production, or
 9 they may not enable us to realize the cost reductions we hope to achieve.

10 (Ex. 1 at 16.)

11 And, in Statement No. 12, SunPower predicted that a “prototype Generation 3 solar cell”
 12 was “expected to be in production in approximately two years” and “is *a key element in our*
 13 *roadmap to reduce total systems costs[.]*” (FAC ¶ 146.) SunPower also specified risks that could
 14 cause it to miss its prediction about its prototype Generation 3 solar cell, including “construction
 15 difficulties or potential delays in the project implementation process,” and “the risk of
 16 continuation of supply of products and components from suppliers.” (Ex. 5 at 9.) SunPower also
 17 disclosed additional risks related to “new or enhanced products,” including “technical challenges”
 18 and “disruption in customers’ ordering patterns,” and cautioned that failure to manage such risks
 19 could “adversely affect our business.” (Ex. 4 at 61.)

20 Statements Nos. 3, 12, and 14, therefore, along with SunPower’s other projections
 21 regarding its cost-reduction plans, are protected by the safe harbor. *See LeapFrog*, 527 F. Supp.
 22 2d at 1046-47 (ruling safe harbor protects statement that “investments in a supply-chain
 23 management system and warehousing and logistics functions ‘will lead to improved margins and
 24 reduced costs in the long run,’” when accompanied with cautionary language “specifically
 25 address[ing]” the risks).

26 **3. The remaining forward-looking statements are protected by the safe
 27 harbor.**

28 Last, the safe harbor protects Statements 1, 2, 5, 17, 18, 24, 25, 27, 28, and 32, which are
 29 other forward-looking statements concerning “future economic performance,” as well as
 30 statements about “the plans and objectives of management for future operations.” 15 U.S.C.

1 §§ 78u-5(i)(1)(B)-(C). The Company identified each of these statements as forward-looking, and
 2 accompanied them with meaningful cautionary statements. In Statement 2, for example,
 3 SunPower predicted it would expand solar cell production “by more than 150% in 2008 compared
 4 to 2007.” (FAC ¶ 138.) SunPower accompanied this statement with meaningful cautionary
 5 language by, among other things, warning investors that “[e]xpanding our manufacturing
 6 facilities or developing facilities may be delayed by difficulties such as unavailability of
 7 equipment or supplies or equipment malfunction.” (Ex. 1 at 18.) Accordingly, these statements,
 8 like all of the forward-looking statements challenged in the FAC, are protected by the safe harbor
 9 and cannot form the basis for liability in this action. Judgment should be granted with respect to
 10 claims that are based on these statements.

11 **B. Plaintiffs Fail to Plead that the Forward-Looking Statements Were False.**

12 An independent basis for granting judgment on claims that are based on the forward-
 13 looking statements is that Plaintiffs have not alleged that any of the forward-looking statements
 14 were false. A forward-looking statement can give rise to liability as a false statement only where
 15 a plaintiff pleads facts showing that the statement lacked a reasonable basis when it was made. *In*
 16 *re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 388 (9th Cir. 2010); *In re Rackable Sys., Inc. Sec.*
 17 *Litig.*, No. C 09-0222 CW, 2010 WL 3447857, at *5 (N.D. Cal. Aug. 27, 2010) (dismissing
 18 claims based on forward-looking projections when “Plaintiffs fail[ed] to allege contemporaneous
 19 facts that show that Defendants did not have a reasonable basis for these projections when they
 20 were made”). Plaintiffs plead no such facts with respect to any of the forward-looking statements
 21 at issue here. Indeed, with respect to many of these statements, Plaintiffs do not even plead facts
 22 showing that the predictions did not come true.

23 For each of the seven quarters at issue in the Class Period, the FAC quotes large blocks of
 24 public statements made by Defendants, including the forward-looking statements listed in
 25 Attachment A. (FAC ¶¶ 136-201.) The FAC then alleges in conclusory fashion that “each”
 26 statement in the large blocks of quotes was false and misleading when made, and repeats a
 27 boilerplate list of reasons. (*See id.* ¶¶ 144, 154, 164, 173, 183, 192, 201.) While the boilerplate
 28 attempts to describe why statements concerning *existing* facts were false—by contrasting the

1 original statement with the restated financial statements—it contains no such description for the
 2 forward-looking statements.

3 Statement No. 13 in Attachment A illustrates this pattern. There, Plaintiffs excerpt a
 4 quote from an earnings press release in which Mr. Werner stated:

5 ***[I]n order to meet expected future demand and scale economies to reach
 6 our cost reduction goals,*** SunPower announced plans to build its third solar
 7 cell manufacturing facility in Malaysia which, when completed, will have a
 nameplate capacity in excess of 1 gigawatt.”

8 (*Id.* ¶ 146.)

9 The boilerplate falsity allegations that follow do not allege facts showing that SunPower
 10 misled investors about its reasons for wanting to build the new Malaysian facility, or that
 11 SunPower never built the facility, or that the facility failed to have a nameplate capacity in excess
 12 of 1 gigawatt. Indeed, Plaintiffs say nothing about these topics. Since Plaintiffs do not allege
 13 facts showing that this statement lacked a reasonable basis when made, or even failed to come
 14 true, the statement is not actionable. *See Ronconi v. Larkin*, 253 F.3d 423, 430 (9th Cir. 2001)
 15 (affirming dismissal of claims based on optimistic projections about a merger when “no facts are
 16 alleged in the complaint that would support an inference that the company’s more optimistic
 17 predictions were known to be false or misleading at that time by the people who made them”); *In*
 18 *re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 514 (9th Cir. 1991) (no liability for projection
 19 that “pretty much” came true).

20 Statement No. 23 fits the same pattern. Plaintiffs allege that Mr. Werner stated during an
 21 earnings conference call that “we have tested our model and ***can sustain module ASP [average
 22 selling price] reductions in excess of 20% by accelerating our cost reduction programs*** and
 23 limiting our operating expense growth,” and that “[t]he combination of 50% lower module costs,
 24 50% lower balance of system costs and improved energy delivery allow us to compete favorably
 25 on a levelized cost of energy basis in all markets.” (FAC ¶ 166.) Plaintiffs do not allege facts
 26 showing that this statement lacked a reasonable basis, or even failed to come true. The statement,
 27 therefore, is not actionable.

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1 This same pattern applies to all statements listed in Attachment A (except Statement No.
 2 26, which Defendants do not argue is forward-looking). On this independent basis, the Court
 3 should grant judgment in favor of Defendants as to each of these statements.

4 **III. THE VAGUE STATEMENTS OF CORPORATE OPTIMISM ARE NOT
 5 ACTIONABLE AS A MATTER OF LAW.**

6 Judgment should also be granted with respect to the six vague statements of corporate
 7 optimism listed in Attachment A (Statement Nos. 1, 11, 17, 18, 26, and 29). “When valuing
 8 corporations, . . . investors do not rely on vague statements of optimism like ‘good,’ ‘well-
 9 regarded,’ or other feel good monikers.” *Cutera*, 610 F.3d at 1111. Therefore, “[v]ague,
 10 generalized, and unspecific assertions’ of corporate optimism or statements of ‘mere puffing’
 11 cannot state actionable material misstatements of fact under federal securities laws.” *In re
 12 Cornerstone Propane Partners, L.P. Sec. Litig.*, 355 F. Supp. 2d 1069, 1087 (N.D. Cal. 2005).

13 The six statements listed above are all vague statements of corporate optimism. (E.g.,
 14 Statement No. 11 (FAC ¶ 146) (“**We are well-positioned for success entering the second half of
 15 the year.**”); Statement No. 18 (*Id.* ¶ 156) (“**These developments make us even more confident in
 16 our planned performance as we look into next year.**”)). These statements are not actionable as a
 17 matter of law. *See Cornerstone*, 355 F. Supp. 2d at 1087 (“industry leading” growth, “growth
 18 that positions us beautifully,” “measurable progress,” “continuing improvements,” and
 19 “outstanding results” all not actionable); *In re Rackable Sys., Inc., Sec. Litig.*, No. C 09-0222 CW,
 20 2010 U.S. Dist. LEXIS 2663, at *18-19 (N.D. Cal. Jan. 13, 2010). Judgment should, therefore, be
 21 granted on all claims that are based on these statements.

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CONCLUSION

2 The forward-looking statements and vague statements of corporate optimism challenged
3 in the FAC are not actionable. Their continued presence in this case would serve only to add to
4 the time and expense of discovery and to provide distraction at trial. Defendants respectfully
5 request, therefore, that the Court grant judgment for Defendants on all Section 10(b) and
6 Section 20(a) claims based on those statements.

7 Dated: September 14, 2012 MORRISON & FOERSTER LLP

By: /s/ Judson E. Lobdell
Judson E. Lobdell

Atorneys for Defendants
SUNPOWER CORPORATION, THOMAS H. WERNER,
DENNIS V. ARRIOLA, and EMMANUEL T.
HERNANDEZ

ECF ATTESTATION

I, Andrew S. Bernick, am the ECF User whose ID and Password are being used to file the foregoing document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Judson E. Lobdell has concurred in this filing.

Dated: September 14, 2012

MORRISON & FOERSTER LLP

By: /s/ Andrew S. Bernick